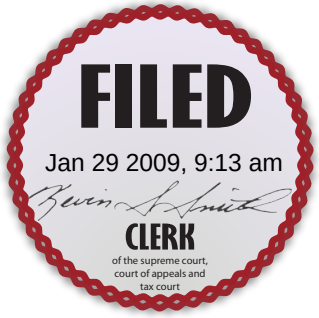

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IN THE
COURT OF APPEALS OF INDIANA

ERIC LEO ARMSTRONG IV,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0805-CR-419
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0506-FB-51

January 29, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Eric Leo Armstrong IV appeals from the trial court's denial of his motion to modify sentence after the court resentenced Armstrong on remand. Armstrong raises a single issue for our review, namely, whether the trial court abused its discretion when it denied his motion.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying Armstrong's conviction and sentence were stated in our prior memorandum decision:

> Armstrong was a twenty-one year old student at Purdue University when he coached L.S.'s youth soccer team as a volunteer assistant. L.S. was eleven years old during that soccer season. The two did not have regular contact after the season, and there were long periods without any contact. Sometime during the summer of 2005, L.S. contacted Armstrong via America Online instant messaging after obtaining his screen name.
>
> In August 2005, Armstrong and L.S. arranged to meet during the night. He was twenty-four years old at the time and L.S. was fourteen. L.S. got into Armstrong's vehicle outside her father's house. The two began hugging and kissing. L.S. placed her hand on Armstrong's genital area.
>
> On September 16, 2005, L.S. reported the incident to Lafayette Police. The State charged Armstrong with Class B felony sexual misconduct with a minor and two counts of Class C felony sexual misconduct with a minor on September 23, 2005. On February 16, 2007, Armstrong pled guilty to two counts of Class D felony sexual misconduct with a minor. The plea agreement stipulated that Armstrong would serve a term with Tippecanoe County Community Corrections in lieu of an executed sentence.
>
> On April 10, 2007, the trial court sentenced Armstrong to three years for each charge, to run concurrently. The sentence was suspended and to be served on supervised probation. The trial court also imposed a $10,000.00

> fine and ordered Armstrong to pay $1,000.00 to the Sex Crimes Victim's Fund and $100 to the Child Abuse Prevention Fund. This appeal followed.

Armstrong v. State, No. 79A02-0705-CR-372, at 2-3 (Ind. Ct. App. Nov. 30, 2007) ("Armstrong I") (footnote omitted).

In Armstrong I, Armstrong argued that the trial court improperly relied upon his position of trust as an aggravator when it sentenced him, and that his sentence was inappropriate. We held that the trial court properly identified Armstrong's position of trust over his victim as an aggravating circumstance, but we acknowledged that the maximum three-year sentence was inappropriate. We then stated that "[t]he sentence should be reduced to [the advisory term of] eighteen months[,] on supervised probation," and we remanded this case to the trial court to enter judgment accordingly. Id. at 8.

On January 17, 2008, Armstrong filed in the trial court his motion to modify sentence, in which Armstrong sought to have his Class D felonies reduced to Class A misdemeanors. The next day, the trial court entered its amended sentencing order, which reduced Armstrong's sentences from three years to one and one-half years, and the court ordered the State to respond to Armstrong's motion to reduce his convictions to Class A misdemeanors.

On April 16, 2008, the court held an evidentiary hearing on Armstrong's motion. At the conclusion of the parties' arguments, the following exchange occurred:

> **BY THE COURT:** There's no time limit on requesting misdemeanor treatment, is there? That's a modification the Court can enter without the Prosecutor's consent at any time, isn't it?
>
> **BY MS. ZEMAN [FOR THE STATE]:**I'm not sure, but for the sake of argument let's assume that is.

BY THE COURT: Well, but it's an important question[.] I mean . . . if this is the last time to make the argument I'm going to look at this more closely than I will if it's something that you could ask me to do again after you've completed all the terms of probation.

BY MR. MOORE [FOR ARMSTRONG]: Judge, I'm not aware of any case law that has specifically decided that issue. I've always been of the opinion that it is something that can be brought at any time, but my concern is to the extent that a misdemeanor treatment would change the length of the sentence, you know, my practice has been to try to bring it within the year simply to avoid, you know, any possibility, so I honestly don't know and I think it is possible that it would be something that you have to bring in the year and that's been my operating policy and the standard of my advice to clients even though I do think there's a legitimate argument that it is not a modification of sentence.

BY THE COURT: Now, misdemeanor treatment is also something that can be granted by the sentencing court on the date of sentencing, isn't it?

BY MS. ZEMAN: Yes.

BY MR. MOORE: Yes, Judge.

BY THE COURT: So if I was wrong with my sentence it's something that the Court of Appeals could have corrected, isn't it?

BY MS. ZEMAN: Yes, it is part of the terms of a sentence.

BY THE COURT: Was this one of the arguments that was made to the Court of Appeals that the sentence should have been imposed as a misdemeanor?

BY MR. MOORE: No, Judge, we did not make that argument.

BY THE COURT: Presumably the Court of Appeals in correcting the sentence imposed what they believed was the correct sentence.

BY MR. MOORE: I think under the appellate rules that they would have had the power to reduce it if they felt that was appropriate[,] Judge.

BY THE COURT: And they certainly considered all the arguments other than that he's responded well to probation that have been made

[here]. I mean, no criminal history, no longer the coach, stopped rather than pushing forward, as well as the other, you know, aggravating factors. I imposed the $10,000.00 fine for a reason that I think the defendant needs to understand and to me that's an important part of this, because I've had other people who think I can do my time, but I want to put a . . . practical burden in addition to whatever the burden of the criminal record might be to understand that there is literally a cost to this and a high cost. I'm, you know, sympathetic with the defendant's difficulty in getting employment. I am sympathetic with the situation that this is likely the result of an immature attitude that the defendant in his maturity has gone beyond, but it is a crime which I thought was an aggravated crime. I have been corrected by the Court of Appeals, but if the Court of Appeals was wrong, you could have asked the Supreme Court to correct them and you didn't and so I'm going to be content with the correction from the Court of Appeals and I don't think I need to go any further than that. The—I know people with felony records who have law degrees and successful law careers. I think that probably the first thing you need to do is to accept your record and be forthright with it as you go forward into your applications. There are people who will hire you, but there probably are not a lot of people who will hire you . . . when they find out at the last minute that that's the situation. And, again, I believe you have the opportunity to come back to me in the future and ask again. You know, I don't want to hold out any hope that my decision will be different, but . . . the terms which I set up for the sentence haven't been completed and so if for no other reason I'm not inclined to grant this for that reason. I think that, you know, I'm sad. it's a waste of a Purdue education . . . and I'm very sad about that and a waste of a promising career in which as far as I can see . . . there are not any other kinds of offenses[.] [T]he letters from the teammates are kind of disturbing because it [sic] suggests that there is a relationship with those girls which was not, you know, without assuming that there was any additional physical contact with any of them it was outside the kind of relationship an older coach should have with younger children. There is a dynamic in the relationship between teacher and student that always involves a kind of affection. The society depends upon people maintaining the platonic relationship there and not confusing the boundaries. Confusion of the boundaries can lead to problems for the students in the future as there is some suggestion in the letters I'm received today [that] the problems linger for [L.S.] The Court of Appeals may not have seen it the way I did. They apparently did not see this . . . any longer [as] a teacher[-]student relationship, but I do. And they did correct the sentence in the manner they thought was

> appropriate. I'm going to leave their decision in place. The motion is denied.

Resentencing Transcript at 23-27 (emphases added). This appeal ensued.

DISCUSSION AND DECISION

Armstrong argues that the trial court abused its discretion in denying his motion to reduce his Class D felonies to Class A misdemeanors.[1] "Under Ind. Code § 35-50-2-7(b), the trial court has the discretion to enter judgment and pronounce sentence for a class A misdemeanor when the accused has been found guilty of a class D felony . . . ." Sears v. State, 457 N.E.2d 192, 196 (Ind. 1983). "Only if the court exercises that option must it enter in the record, in detail, the reason for its action." Gilbert v. State, 426 N.E.2d 1333, 1338 (Ind. Ct. App. 1981). Further,

> The trial court has broad discretion to modify a sentence. Ames v. State, 471 N.E.2d 327, 331 (Ind. Ct. App. 1984). As a general rule, an abuse of discretion will not be found unless a decision is clearly against the logic and effect of the facts and circumstances before the court. Id. In determining whether an abuse of discretion occurred, we may not reweigh the evidence, but will consider only the evidence favorable to the judgment. Catt v. State, 749 N.E.2d 633, 640 (Ind. Ct. App. 2001), reh'g denied, trans. denied 761 N.E.2d 422 (Ind. 2001).
>
> * * *
>
> In Marshall v. State, 563 N.E.2d 1341 (Ind. Ct. App. 1993), trans. denied, Marshall argued the court abused its discretion because denial of his motion for sentence modification was against the weight of the evidence submitted—a personal statement of good conduct and remorsefulness, of rehabilitative efforts, and of employment opportunities. Id. at 1343-1344. We found no abuse of discretion, as Marshall's evidence was "all self-serving and does not inevitably lead to the conclusion the guilty plea court

[1] Armstrong does not argue that Indiana Code Section 35-38-1-1.5 applies here. And neither party asserts that the law of the case doctrine, res judicata, or some other doctrine of estoppel prevented Armstrong from requesting the trial court to reduce his convictions to Class A misdemeanors. Accordingly, we do not address those issues.

> abused its discretion in refusing to further reduce or to suspend Marshall's sentences." Id. at 1343.

Banks v. State, 847 N.E.2d 1050, 1053 (Ind. Ct. App. 2006), trans. denied.

Here, the crux of Armstrong's argument on appeal is that the trial court misinterpreted Armstrong I by reading in it an implicit command to not reduce Armstrong's Class D felony convictions to Class A misdemeanors. But Armstrong has misunderstood the trial court's statements. To be sure, the trial court, rightfully so, felt bound to impose an eighteen-month sentence in light of Armstrong I. But our prior memorandum decision was not the exclusive grounds[2] for the trial court's denial of Armstrong's motion to modify sentence.

At the April hearing on his motion, Armstrong presented the following, previously unavailable, evidence in support of reducing his convictions to misdemeanors: (1) he had completed his rehabilitation ahead of schedule and had continued to go to counseling afterwards; (2) he had passed polygraph tests; (3) he had been compliant with the conditions of his probation and his community corrections; and (4) he "was unable to capitalize on [obtaining employment] solely because of his status as a convicted felon." Appellant's Brief at 3. That evidence was based primarily on Armstrong's own testimony.

After hearing Armstrong's arguments, the trial court denied his motion principally because of the aggravating circumstances of his crime—namely, the position of trust aggravator we upheld in Armstrong I—and because Armstrong had yet to complete all

[2] In addition to the arguments discussed below, Armstrong argued for the trial court to take into account the mitigating factors we took into account in reducing Armstrong's sentence in Armstrong I. In response, the trial court stated that it was "content" with our analysis of those factors. See Resentencing Transcript at 25. The trial court did not err in that regard.

the terms of his sentence. On appeal, Armstrong does not address either of those grounds underlying the trial court's judgment. Rather, his appeal is nothing more than a request for this court to reweigh the evidence. We will not do so. See Banks, 847 N.E.2d at 1053. As in Banks and Marshall, Armstrong's evidence is "all self-serving and does not inevitably lead to the conclusion" that the trial court abused its discretion in refusing to modify his sentence. See id. (quoting Marshall, 847 N.E.2d at 1343). Accordingly, we must affirm the trial court's denial of Armstrong's motion to modify sentence.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.